Exhibit D

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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SECURITIES INVESTOR PROTECTION

CORPORATION

v. CASE NO. 08-01789-smb

BERNARD L. MADOFF INVESTMENT

SECURITIES, LLC, et al,

Debtors.

- x

IRVING H. PICARD, TRUSTEE FOR THE

LIQUIDATION OF BERNARD L. MADOFF,

Plaintiff, ADV. PROC.

v CASE NO. 10-051430-smb

MARILYN BERNFELD TRUST, ET AL.,

Defendants.

- x

IRVING H. PICARD, TRUSTEE FOR THE

LIQUIDATION OF BERNARD L. MADOFF,

Plaintiff, Adv. Proceeding

v CASE NO. 10-05390-smb

1096-1100 RIVER ROAD ASSOCIATION,

Defendant.

- x

- x

IRVING H. PICARD, TRUSTEE FOR THE
LIQUIDATION OF BERNARD L. MADOFF,

Plaintiff, ADV. PROCEEDING

v CASE NO. 10-04283-smb

MENDELOW, ET AL.,

Defendants.

- x

IRVING H. PICARD, TRUSTEE FOR THE
LIQUIDATION OF BERNARD L. MADOFF,

Plaintiff, ADV. PROCEEDING

v CASE NO. 10-05286-smb

LEGACY CAPITAL, LTD., ET AL.,

Defendants.

- x

U.S. Bankruptcy Court
One Bowling Green
New York, New York
October 28, 2015
10:02 AM

B E F O R E :

HON. STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

ECRO: Unidentified

Adversary proceeding: 10-05143-smb Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff v. Marilyn Bernfeld Trust et al Discovery Conference Pursuant to Local Bankruptcy Rule 7007-l(b) (also applies to Adv. P. Nos. 10-5143 & 10-4841)

Discovery Conference Pursuant to Local Bankruptcy Rule 7007-1 (b)

Adversary proceeding: 10-04283-smb Picard, as Trustee for the Liquidation of Bernard v. Mendelow et al

Discovery Conference pursuant to Local Bankruptcy Local 7007-1 (b)

Defendants' Motion for Judgment on the Pleadings

Adversary proceeding: 10-05286-smb Irving H. Picard, Trustee for the Liquidation of Bernard v. Legacy Capital Ltd. et al

Defendant Khronos Motion to Dismiss

Defendant Legacy Capital's Motion to Dismiss

Adversary proceeding: 08-01789-smb Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC. et al

Trustees Motion and Memorandum to Affirm His Determinations Denying Claims of Claimants' Holding Interests in 1973 Masters Vacation Fund, Bull Market Fund, and Stratthan Partners

Adversary proceeding: 10-04283-smb Picard, as Trustee for the Liquidation of Bernard v. Mendelow et al

Pre-Trial Conference

Adversary proceeding: 10-05286-smb Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff v. Legacy Capital Ltd. et al

Pre-Trial Conference

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allegation in the complaint that Legacy ever made a transfer to Montpellier.

MR. FISHER: No, there's not, Your Honor.

THE COURT: All right. Thank you very much.

MR. FISHER: Thank you.

THE COURT: I'll reserve decision.

Let's take a ten minute recess and then I'll hear the argument in the other matter.

(Recess from 11:10 a.m. until 11:24 a.m.)

THE COURT: Please be seated. Next, Mendelow.

MR. ARKIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. REISEN: You want to speak first?

MR. ARKIN: I just want to say I'm Stanley Arkin.

THE COURT: How do you do?

MR. ARKIN: I appear for Mr. Mendelow. And my colleague, Alex Reisen, who will be speaking mainly to --

THE COURT: Right.

MR. ARKIN: -- (indiscernible) here.

THE COURT: Okay. Go ahead.

MR. REISEN: Alex Reisen from Arkin Solbakken representing defendants, Steven Mendelow, Nancy Mendelow, Cara Mendelow, Pam Christian and C&P Associates, Ltd. and Inc.

I'm sure we're going to talk about the actual

knowledge exception. I just wanted to bring to the Court's attention certain language in Ida Fishman that actually raises the question about whether even an actual knowledge exception still could persist. And that -- in the beginning, the third and fourth paragraph of that, they define the class of people that they're trying to claw back from as people that profited from Madoff's Ponzi scheme, whether knowingly or not. And then they define the question -- they don't define the class as we all know it's -- you know, good faith defendants. But -- and also, they define the question as whether they can claw back, whether the types of transfers are the type that are securities.

And then at the last paragraph, they talk about Congress' balance between finality and equity and that you have to respect Congress' balance. And then there's this wording, cannot go past two years at all.

So I just want to raise that. I don't think we'll have to reach it. It's an alternative --

THE COURT: That's in (indiscernible) with the safe harbor, though.

MR. REISEN: Yes. And that's what we're talking about, the safe harbor, the 546(e) safe harbor.

THE COURT: Are you saying -- are you arguing that even if the defendants had actual knowledge that Madoff was conducting a Ponzi scheme that the trustee can't go back

more than two years?

MR. REISEN: I'm saying that potentially you can read Ida Fishman that way. That is -- we all understand that those were good faith plaintiffs, what Cohmad says. I understand what can -- I understand what was just argued. I just want to bring that language to the Court's attention. I haven't seen it argued that way.

THE COURT: I thoroughly -- I'm familiar with the language.

MR. REISEN: Fair enough. Okay. Very good. So you're also quite familiar clearly with the strictness of the Cohmad standard. It is at a minimum so it's not an exemplar. Actual knowledge is the high degree of certainty beyond high probability of known securities trades. So extraordinarily high standard.

Then I think, really, the key message here is that we are cabined in by Merkin. I think this decision really could be a one-word decision. It could be Merkin, motion granted. And I think the key difference between Merkin is that he -- in the words that Your Honor used. He developed an understanding and appreciation of what the red flags could mean. That is, that indicated a potential Ponzi scheme. He said this appears to be a Ponzi scheme. He was aware of the impossibility of trades. He was told of the possibilities.

THE COURT: Is this really a red flags case? This sounds like --

MR. REISEN: Can it --

THE COURT: The sense I get from the complaint is it's almost an allegation of an aiding and abetting type.

MR. REISEN: Solely red flags. No allegations of any subjective interpretation of the red flags. And, in fact, to the extent that you want to say what is a reasonable inference, they're sort of -- and I understand that this is not in the complaint but, as Your Honor knows, when you judge whether something's plausible, you use all your experience and things like that.

We have this funny thing. We're actually Preet Bharara. And Judge Swain from the southern district actually say that Paul Konigsberg comes out and files in the southern district of New York, someone who has all the red flags that Mendelow had, guaranteed rates of return, referral fees, paybacks and more. He had (indiscernible) in fraudulent transaction and he personally backdated options trade. Both of them come out. It's totally in an unsurprised and conclusion. They don't feel the need to explain themselves. That -- he had known we're at zero. High degree of certainty, high probability, known suspicion of a Ponzi scheme. So Mendelow was actually less than zero to some extent.

THE COURT: So you're saying that Mendelow -- I mean, Madoff got together and said let's really cook up these account statements so I can make money. That's not an indication that they knew that. No actual securities were being traded.

MR. REISEN: Where is that allegation?

THE COURT: I'm asking you a hypothetical question. I do that.

MR. REISEN: Of course. If they got together and -- can you ask the question again?

THE COURT: Yeah. Mendelow and Madoff got together and said let's create some fictional account statements so that that will justify more payments to me. That wouldn't support an inference that he knew that Madoff is not engaged in the trading of securities?

MR. REISEN: I don't even think that would be a high degree of certainty of (indiscernible). But --

THE COURT: I think we have a basic disagreement on the state of the law. But --

MR. REISEN: Okay.

THE COURT: -- with all due respect to the U.S. attorney.

MR. REISEN: Fair enough. Fair enough. But let's talk about the one big move that they make in their motion which is that they say that Mendelow personally directed --

personally participated in the fraud by directing --

THE COURT: It's all in paragraph 94 of the complaint. So why isn't paragraph 94 -- why isn't that sufficient to -- and you can get a copy of the complaint.

MR. REISEN: Sure. That would be great.

THE COURT: But why isn't that a sufficient allegation to support --

MR. REISEN: Well, what --

THE COURT: -- the -- let me -- please, let me finish.

MR. REISEN: Sure. I'm sorry.

THE COURT: Why isn't that a sufficient allegation to support the conclusion for purposes of the motion to dismiss that the complaint pleads that Mendelow directed BLMIS to create fictitious trades to catch up with the shortfall between he was promised and what the statements showed.

MR. REISEN: Right. So what is actually alleged is three things. He calculated what he was owed in referral fees, a straight percentage of what he referred from Telfran; that he looked at his account balance at the end of the year, or whatever, do I get my 230 grand. And if he didn't, he calls him and says can you make this up. No allegation (indiscernible) he did it by trading, that they did it by fake trading. In fact, it's just the opposite.

They allege that they did it secretly and independently. The Schupt process which they did it for dozens of people and it was handwritten.

Now let me -- if I can make --

THE COURT: Can I ask you a question?

MR. REISEN: Sure.

THE COURT: And it's not in the complaint but how did -- how was Mendelow paid his commissions? You know, through a voting clients or customers, whatever.

MR. REISEN: In this case, it is alleged that --

THE COURT: I'm asking how it really happened. In other words, normally, I would think that if somebody was earning a commission for referring investors --

MR. REISEN: Right.

THE COURT: -- they receive a check --

MR. REISEN: Right.

THE COURT: -- at some point.

MR. REISEN: Right.

THE COURT: The complaint seems to say that the way Mendelow was compensated was that value --

MR. REISEN: That's exactly right.

THE COURT: -- was added to his account. Now I suppose that that could be done legitimately by --

MR. REISEN: Yeah. Well, they allocate winning trades.

THE COURT: Let me --

MR. REISEN: I'm sorry.

THE COURT: I suppose that could be done legitimately by putting money into the account or putting securities into the account. Is that the way he was compensated, though, through his accountant?

MR. REISEN: Exactly right. Exactly right. So he just looked at it and that's where the (indiscernible) are. And you could see that he has an injunction from the SEC saying do not trade securities. Do not refer securities without a registered -- so -- and I think Mr. Warshavsky actually said --

THE COURT: Isn't that an unusual way to compensate somebody?

MR. REISEN: Is it unusual.

THE COURT: In other words, unless you actually see somebody putting cash in -- a cash deposit were the deposit of securities, how do you get compensated by -- how do you get compensated? I don't understand.

MR. REISEN: Yes. I agree it's not maybe the usual way. Does it lead to any sort of -- one single factual allegation that he recognized this as unusual, that he went from high degree of probability to a certainty or actual knowledge that he's not trading securities. And Mr. Warshavsky said he'll see something strange, the Volkswagen.

You don't immediately see it's the thing but you start conversing (indiscernible). If you have a strange way of paying referral fees, you don't say, oh, I'm absolutely certain that this is a totally implausible thing that's never happened before that it's been doing for 20 years with billions of dollars, no one's figured it out, that's not good, it's not plausible that that's a -- the non-speculative strong imprints that's pled with particularity. Whereas in Merkin, you have a subjective interpretation of such an unusual thing. You know, one after the other. He actually talks to Bernie Madoff and says what about these daily trades, the (indiscernible) trades? What about the lack of self-clearing. He's told that it's impossible. He has all of that stuff and even Merkin does not reach the actual knowledge. So Mendelow doesn't even reach Merkin. He never forms any suspicion about that this is unusual. Yes, it's inquiry notice, that's correct. It is an unusual way to do it.

THE COURT: Go ahead.

MR. REISEN: Okay. So the big -- and this is their big move. And so, they're asking to infer from those facts checks and balances, it's not enough. Give it back. It's analogous to if Mendelow looks at his drying cleaning bill and says, oh, you've been overcharging me 200 dollars. I'm going to call up the dry cleaner and says, hey, pay me

back 200 dollars; you overcharged me. Now unbeknownst to Mendelow, the dry cleaner is a drug addict. She's been stealing from the till and overcharging customers. She goes out on the street and knifes someone to death for (indiscernible) 200 dollars and pays back Mendelow. Did Mendelow personally participate in the street murder by personally directing him to commit street murder? Of course not. But that's exactly the trustee's logic.

So that's the jump. So we're cabined in by Merkin. We're cabined in by Konigsberg. We're less than zero. And the other allegations are referral fees generally. We already know that Judge Stanton says no indication of fraud. And in general, you have guaranteed rates of returning the same way of paying you back at the end of the year. You get up to the percentage by basically allocating you winners, I suppose. If it was even alleged that Mendelow looked and saw that it was trades being done -- he just looked at his balances, right?

So that -- again, if we guaranteed rates of return matter, the SEC would have known when they looked at the Telfran thing. They knew the guaranteed rates which were --

THE COURT: Well, obviously, the SEC was wrong.

MR. REISEN: Yes, clearly. Right. But I guess the question is was it a plausible inference. And they even think of it as for a second.

And we have in both Prickett and in Merkin, highly -- impossibly high rates and consistent rates. Still, unless you --

THE COURT: Well, I think it's a difference between generally performing at an unusually high rate and you guarantee those rates.

MR. REISEN: Yes. Well, let's talk about that. I guess the idea is that, yes, if you're -- if at the end of the year you're at 16 percent, I'm going to bring you up to 17 percent, right, by allocating you trades. It's not -- it's a -- the plausible non-speculative imprint is not that Steve Mendelow suddenly had actual knowledge that it's the thing that's never happened before. And again, there's not even any -- even if that was, there's no -- again, it's inquiry knowledge. There's no allegation that he ever interpreted this and had an understanding and appreciation, the words that Your Honor used.

And this is the same language used in Prickett. You never even get to the middle level of requisite.

THE COURT: Bridget?

MR. REISEN: Prickett. It's actually a 10(b)(5) in the Madoff context. But it's the same thing in the -- the Court there said that you don't -- unless you interpret

such a red flag with a high degree to have -- be some sort of subjective indication. Unless you translate it, you don't even get to recklessness. It's not probative.

So -- and then we have the Fifth Amendment imprints, which we've already looked at Judge Stanton. It says you don't even need it to draw the inference. If you do, it's weak. Everyone was thought to be brought into a criminal vogue. In this case, I suppose if you were going to think of, well, what was Mendelow thinking, he was probably afraid of criminal contempt on the injunction perhaps. But, again, it's not -- the trustee offered nothing that could ever make such a jump. I plead the Fifth. All of a sudden, he had actual knowledge that Bernie Madoff never traded any securities.

And this is also distinguishable -- I think the line that Your Honor has brought in is in the Kingate and Surretti (ph) case. And the difference there is that not only did they not have a subjective interpretation of Merkin but now in Surretti, they actually do the comparison, figure out he's doing fictitious trades, talk to each other about how it's a scam and all the reasons for it. And then make up stories. Try and keep other people out. Right? I mean, they list all the different things. What are they going to ask? What stories are they going -- you going to tell? They fabricate the stories. They don't go and investigate.

So -- and, of course, there's -- I mean, the relationship of both Merkin, very close inner circles, Surretti, Mendelow. The sole allegation of his special access is he can refer clients. He can get them in contact, you know, give him his phone number, type of thing. Not inner circle. Not a special access type of case.

So that's Surretti. That's -- I believe that's all of the allegations of actual knowledge.

And then I guess we've asked that Your Honor not give them the leave to amend. I think we have delay. We have futility. They're not even close. They haven't even offered a possible new allegation. They've had tons of discovery. They've had all of our documents for five years. There's nothing that they can add.

THE COURT: Well, this complaint is obviously drafted before these various cases came down explaining the standard.

MR. REISEN: Yes.

THE COURT: Why not give him another chance to plead in accordance with the standard that's now been established?

MR. REISEN: Yes. If it wouldn't be futile, of course.

THE COURT: Well, how do I know if --

MR. REISEN: If they could offer an allegation.

But there isn't -- there's no facts. We know that there's no facts. They have the documents. They've been doing discovery that no plaintiff has ever dreamed of --

THE COURT: Well, maybe --

MR. REISEN: -- for five years.

THE COURT: Maybe when they drafted this complaint, they thought that what they drafted was sufficient and what they thought the state of the law was then.

MR. REISEN: Oh, I think they did. I think that's right. But I think the problem is that they -- you need to actually propose a fact that would make it not futile, right? They had represented to this Court even after Ida Fishman that they're not thinking of amending. Now if they thought

actual -- remember, back in when Katz was decided, if they knew this was an actual knowledge case, they could have just gone ahead. Why did they give us four years of extensions if Katz wasn't going to matter, if they were pleading actual knowledge anyway? They could have just gone ahead. We're going to be prejudiced. We thought we were going to have to do objective notice which is essentially the only reason a person would have done. Now all of a sudden, we've got to go back five years. How are we going to prove subjective state of mind. Totally different set of evidence. We are

prejudiced.

THE COURT: Why didn't you move to dismiss the complaint four years ago?

MR. REISEN: Well, because -- that's a great question. Because we didn't want to waste the resources. What if Katz and Ida Fishman goes the other way? It's useless. The whole point is -- our whole understanding was that we're waiting to see -- of course, you're not --

THE COURT: Well, can't you make the same argument as to why they didn't amend the complaint? If you're waiting before you make the motion to dismiss, why isn't it fair for them to wait in order to make a decision to amend the complaint? For instance, the court of appeals could have said (indiscernible) notice was enough.

MR. REISEN: Well, they -- yes. They thought that they were going under actual -- they're claiming to believe that they've always had actual knowledge. If they had actual knowledge, they could have gone ahead and -- anyway, there would have been no reason to wait if they thought they had actual knowledge.

Now -- and either way, the point is that it's their burden to plead. It's not our burden to inform or move to dismiss when it's going to be a waste of time.

THE COURT: So why not let them re-plead and see if they can re-plead the complaint?

MR. REISEN: Well, because we're prejudiced. Because --

THE COURT: How are you prejudiced?

MR. REISEN: Because we're not -- mostly because of the time that we've been forced -- we won't be able to go and get subjective evidence.

THE COURT: What do you mean?

MR. REISEN: Evidence as -- it's a totally different set of evidence that -- we're on notice five years ago that their complaint is -- they never even claimed (indiscernible) any subjective notice at all. There's no facts at all. We've never been -- so we're waiting -- we're trying to get evidence on, I guess, object of notice. All of a sudden, five years down the line, we've got -- oh, it's a totally different thing.

THE COURT: But you knew that was the standard at the test. Didn't you start to gather that evidence?

MR. REISEN: We're not on notice that there's any possibility that we could ever even face a claim. There's not even a conclusory statement of anything like actual knowledge --

THE COURT: So what kind of evidence would you have to gather?

MR. REISEN: -- let alone facts.

THE COURT: What kind of evidence would you have

gathered that you can no longer gather?

MR. REISEN: Well, I suppose everyone's testimony, everyone's memory, what did Steve tell you, what was his thoughts, subjective thoughts about this. His memory fades. People -- I mean, for example, DiPasceli is now dead, right? We want to ask, well, were there any conversations that Mendelow --

THE COURT: Did he have any conversations with --

MR. REISEN: I think --

THE COURT: -- DiPasceli?

MR. REISEN: I don't believe so but --

THE COURT: So --

MR. REISEN: But we could ask DiPasceli did you ever have any conversations with Mendelow, right?

THE COURT: Well, Mendelow will say I didn't and they won't be able to say anything else, will they?

MR. REISEN: Well, I suppose that's right. But the bottom line, I guess, is that they've had so much evidence. They've made this motion that we believe is actually -- there's no basis for. We've had to defend against it. They claim that they're not going to amend it. They don't even have a basis to amend. They still don't even propose in their complaint what they could possibly add. So how can we even argue futility. And the case law actually says that you can infer that it's going to be

futile.

And again, we're not even close. We're way down below zero. They've got to get up to 99. They've got to pass Konigsberg and Merkin, all the way up. What are they going to allege? There's nothing -- there's no facts --

THE COURT: Let's find out.

MR. REISEN: Very good. Very good. Thank you.

MR. ARKIN: You want to mention Konigsberg?

MR. REISEN: I think we did speak about Konigsberg, is that correct? Konigsberg and Preet Bharara and about how he had more red flags and still be --

THE COURT: Well, but that's what the U.S. attorney says.

MR. REISEN: Fair enough. Fair enough.

THE COURT: Okay.

MR. REISEN: It just goes --

THE COURT: We may disagree on that.

MR. REISEN: Fair enough.

MR. ARKIN: Why do you say, Your Honor --

THE COURT: Sure. Speak into the microphone, please.

MR. ARKIN: I'm sorry. I should be closer. I just want to say Preet is the U.S. attorney.

THE COURT: Yes. I understand --

MR. ARKIN: A responsible public official for law

enforcement, a man who had a number of these cases passed through its office. He comes out and he says what he says. And in the period of time we've had this case in our office, five years, six years, there's been nothing coming from them remotely suggesting actual knowledge on the part of our clogged (indiscernible). He was getting commissions for clients or investors he -- starting in 1993 he recommended to the company, New York (indiscernible). There was nothing, six years, which has emerged which shows what Merkin and Konigsberg demonstrate actual knowledge is on the part of Mr. Mendelow. Just nothing.

THE COURT: Thank you.

MR. NEW: Good morning, Your Honor. Jonathan New from Baker Hostetler for the trustee. With me at counsel table this morning is Robertson Beckerlegge also of Baker Hostetler.

THE COURT: How do you do?

MR. NEW: Your Honor, as I think the standard has been clearly set out here. The standard to overcome the 546(e) safe harbor is the complaint has to plausibly allege facts suggesting that the defendants had actual knowledge that there were no legitimate securities transactions occurring in the accounts. And while I am prepared to discuss, Your Honor, I think there are several different facts in this complaint that support that allegation going

all the way back to his relationship with Telfran and the SEC action through the guaranteed rates of return.

THE COURT: Yeah. I read all that. And I read the Avellino again in his motion. I don't know what that has to do with actual knowledge there were no securities being traded.

MR. NEW: Your Honor, I think it's context. And it goes to what their state of mind was at the time that they did enter into the transactions that Your Honor (indiscernible) which is what is the key fact here, which is what's alleged in paragraphs 94 through 96 of the complaint.

THE COURT: See, the way I read paragraph 94, Mendelow says there's a shortfall. You owe me money. Make it up. That's all that paragraph 24 (sic) alleges. And then -- 94. And then it goes on to allege in the last sentence that the way BLMIS did it is it created fictitious trades in the accounts. But unlike some of the other cases we've seen where -- and I'll use Cohmad as an example that the defendant
Jaffe -- he actually participated in directing the creation of fictitious and backdated trades. That's not -- I don't read 94 to allege that. Can you allege in words or substance that Mendelow actually got together with representatives of BLMIS, whether it's Madoff or somebody else, and said, you know what, I want you to create these

fictitious trades as a way to compensate me? Can you make that allegation?

MR. NEW: Well, Your Honor, what we do allege -- and then --

THE COURT: I guess the answer is no.

MR. NEW: No. Your Honor, I think we can in the sense that I think it's here. And I'm stuck to what's in the complaint.

THE COURT: I don't agree that it is. I just don't see it.

MR. NEW: Your Honor, may I proceed?

THE COURT: Go ahead.

MR. NEW: I think first you have to understand what is the nature of these -- what we call fraudulent side payments but they were co-worker (indiscernible) --

THE COURT: They're -- you can call them fraudulent side payments. And that's --

MR. NEW: But I think, Your Honor --

THE COURT: -- you know, that's an inflammatory phrase. I didn't -- it looks like they're commissions.

MR. NEW: Your Honor, if you prefer to call them commissions --

THE COURT: Well --

MR. NEW: -- you can call them commissions but --

THE COURT: If you want to call it fraudulent side

payments --

MR. NEW: But --

THE COURT: -- go ahead.

MR. NEW: But the key issue is the nature of them. And I think Your Honor had this colloquy with Mr. Reisen as to exactly how they occurred every year, every December, in the accounts that he was monitoring. And so, from the very beginning when he first started receiving these commissions, if you'd like to call them that, they weren't payments. They weren't checks. They weren't cash. They weren't securities deposited into the accounts. They weren't, as Mr. Reisen seems to suggest, some allocation of winning transactions from someplace else in BLMIS.

What were they? They were trades in these accounts based upon the principal supposedly in those accounts that yielded the magic pre-determined amount every single time. And it was done through these options transactions. The allegations here are that Mr. Mendelow knew that he was receiving them, that he tracked his accounts, he monitored whether he received it, he was looking at his accounts. He would not have seen any other way he was receiving these fees other than through such fictitious transactions.

So with that as background, when you get to the point that he tracks and monitors those accounts, does a

calculation which is based upon his understanding of a 17 percent guaranteed return and also the amounts of these transactions. And he says that should have been my return, my yield on my account. And then he compares that to what he actually got as returns on the account. And then he says no, you need to make it up to me. There's no other way that that could have been made up to him given his knowledge of what's been going on in these accounts other than through these fictitious transactions.

THE COURT: Well, but, you know, your brief in several places says that Mendelow directed BLMIS and Madoff to do this. He may have acquiesced to it but I don't see where he directed --

MR. NEW: Your Honor --

THE COURT: -- Madoff to do certain things other than make up the shortfall.

MR. NEW: Your Honor, that's a straight quote practically from paragraph 96 which says "The fact that Mendelow was able to direct the value of his accounts at BLMIS based upon his own calculations and to ensure he received specific amounts through fictitious options transactions is indicative of his knowledge of fraudulent trading activity."

THE COURT: I don't read 94 as directing the value in his accounts. Again, it's just saying you owe me money,

make up the shortfall. And then it says the way BLMIS did it is it added these fictitious trades to the account to generate the "profits" necessary to make up the difference.

MR. NEW: Well, Your Honor, in ways --

THE COURT: That's really what is alleged.

MR. NEW: Well, I think it alleges that but there is -- if it's not explicit, and I think it is more explicit than that, but there is the inference of how was that done because if he's looking at his accounts before, as we say he's closely monitoring them, and he sees that the only way he's getting these gains is through securities transactions and then he says make it up to me, and it's corrected, and he looks back at his accounts and he sees there's no inflows of money, there's no inflows of securities. (Indiscernible) fictitious options transactions.

THE COURT: Okay. But there were options transactions listed in the statements which generated the profits, right -- the shortfall?

MR. NEW: Correct. The exact amounts of profits.

THE COURT: So why isn't it plausible for him to assume that Madoff gave to these transactions, allocated them and that's how he made up the difference?

MR. NEW: Well, Your Honor, I think there's several reasons why that's not plausible. I think, first of all, the fact that he's engaging in speculative options

transactions over a number of years that always hits on a pre-determined amount is not plausible.

Second, he has various accounts that he's monitoring. Some of these accounts, for his daughters, for example, do not receive these fictitious options transactions. All these accounts are supposedly engaging in the same strategy. If Madoff is able to invest his funds in such a way to get a return of 20 percent or more in his accounts, why isn't he doing that in all the accounts? It's not plausible to imagine that a broker could go out in the securities market and always, in the same month, in every year engage in securities transactions that only -- that always yield the pre-determined amounts.

THE COURT: Actually, you just raised an issue about the other accounts. Don't -- doesn't the liability of some of those account holders depend on the imputation of Mendelow's knowledge?

MR. NEW: That's correct, Your Honor.

THE COURT: All right. I understand (indiscernible) C&P. But as to the other transferees, where are the allegations it's (indiscernible) imputation?

MR. NEW: Your Honor, the other allegations with regard to (indiscernible) C&P are that, effectively, that Mr. Mendelow acted as their agent.

THE COURT: That's a conclusion. What are the --

MR. NEW: Yes, Your Honor. The only allegation in the complaint -- and again, you know, we pled this at a time, Your Honor, when we did not believe we had factual knowledge for all the defendants.

THE COURT: Do you want to re-plead your complaint?

MR. NEW: Well, Your Honor, we think it's sufficient.

THE COURT: All right.

MR. NEW: But if it's not, we were going to ask for leave to re-plead.

I would point, Your Honor, to paragraph 6 of the complaint which says that all the BLMIS accounts basically were managed and overseen by Mr. Mendelow.

THE COURT: That's -- that just sounds like a conclusion to me.

MR. NEW: It may be, Your Honor. It --

THE COURT: I've had other cases where, for example, the principal or the agent is getting all the account statements and reviewing all the account statements and giving directions relating to all the account statements. And that's not in this complaint.

MR. NEW: It's not, Your Honor, quite frankly, because we didn't, at the time, believe we needed to plead that. If we do need to plead that, Your Honor, we can re-

plead and include allegations --

THE COURT: But don't think you have to plead that? I mean, this -- the entire complaint is sprinkled with knew or should have known and know or should know, but that's not the standard. At least for now.

MR. NEW: That's correct, Your Honor.

THE COURT: All right.

MR. NEW: Although it does say "knew" so there is --

THE COURT: Well --

MR. NEW: -- an alternative. It is an alternative argument.

THE COURT: But then again, that's a conclusion that something knew something. You'd have to allege facts.

MR. NEW: Yes, Your Honor. And I believe, as we are -- we've been discussing the facts there are to support that knowledge.

The one thing we haven't touched on, Your Honor, is the guaranteed rates of return which, similarly, the allegations in the complaint are that he knew he was going to be receiving a guaranteed return on his accounts of at least 17 percent. He obviously knew before that in Telfran that he was getting a guaranteed return from Madoff as well. And when you're dealing with securities transactions in the market, it is just implausible for anyone to believe that

you can get a guaranteed return. And that's what he was guaranteed here. And not only did he know that, he was tracking it. So it wasn't that he was hopeful that he would get it or that he was monitoring. He expected to get it. And when he didn't get it, that was part of what he asked them to correct.

So again, that goes to the fact that he had actual knowledge that they were not securities transactions that were occurring in his account. And I think it also goes without saying, Your Honor, although it's not an independent basis to conclude this that when Mr. Mendelow was deposed on these issues, he was specifically asked about the fraudulent side payments and the guaranteed rates of return and other things, he did invoke his Fifth Amendment rights and refused to answer.

THE COURT: All he's told me is that he invoked the Fifth Amendment right. So I don't know what he was asked as to which he invoked his Fifth Amendment privilege.

MR. NEW: Well, there is an allegation, and it is general, Your Honor, that he was asked questions specifically about fraudulent side payments and about the guaranteed returns and about Avellino and Bienes and he refused to answer those questions.

Again, Your Honor, this complaint --

THE COURT: I don't know what it says. Anybody

who was being deposed or questioned by the U.S. attorney or the SEC at the time might very well have invoked the Fifth Amendment privilege even though it had -- they had no participation or level of participation that's needed to support an inference of actual knowledge.

MR. NEW: Your Honor, again, it's a permissible inference; it's not a mandatory inference. We would suggest that that is not by itself enough, but given the other facts that we have alleged that show actual knowledge, that factually it's the fraudulent side payments, the facts allege the guaranteed rates of return, that given that, his refusal to answer is sufficient to add to that inference that we've pled enough to meet the actual knowledge standard.

And with regard to leave to re-plead, Your Honor, obviously, we believe that the complaint is sufficient. If it's not, we would ask for leave to re-plead. Some of the issues that we've discussed this morning, Your Honor, are things that could be addressed if necessary in an amended complaint. And --

THE COURT: So why don't you just re-plead the complaint if you think you can make those allegations?

MR. NEW: Your Honor, quite honestly, we think that it's sufficient and it would be a waste of not only judicial resources but our own resources --

THE COURT: Got it.

MR. NEW: -- to file an amended complaint and go through another briefing schedule if this complaint is sufficient.

Also, Your Honor, at this time, we don't have the ability to amend as of right. Given the way that the defendants have proceeded in this case, we would need to seek leave of Court to amend.

THE COURT: So why don't you make a motion for leave to amend and attach your proposed complaint. And they'll argue it's few words not (indiscernible) and deal with it that way.

MR. NEW: Again, Your Honor, we could do that but it would be a waste -- we think it would be a waste of resources.

THE COURT: Well, I think it's -- I'm not convinced that this is a sufficient complaint. And I think it's a waste of resources to have to go through this exercise to then grant you leave to amend and then go through the exercise a second time. But all right.

Certainly, there are valid claims, I think, under the first claim which is just a fictitious profits claim (indiscernible). I wouldn't dismiss that claim.

MR. NEW: Yes, Your Honor. Well, we believe it's sufficient on all the counts.

THE COURT: All right. I got it.

MR. NEW: If Your Honor is inclined, we would seek to make a motion for leave to amend.

THE COURT: I just think it'll save a lot of time. If you think that you can make -- if you can allege that he actually knew or maybe he willfully blinded himself, because that's another distinction that has arisen over the last four years, that you should allege it. But this complaint replete with knew or should have known. It was just -- and I understand why it was done. It was done when everybody thought that's what the state of the law was.

All I'm suggesting is when I review this, I'm probably going to conclude that except for the first claim for relief, it probably is insufficient the way it's pleaded under the old standard. And it'll expedite things if you just make a motion for leave to amend and attach the complaint that it meets the pleading standards (indiscernible).

MR. NEW: Your Honor, we will definitely do that. Should we -- do we need to, at this time, address a briefing schedule on that or should we discuss it with the parties?

THE COURT: I think you should just -- well, you can discuss it with your colleague but I just think that's the best way to handle this. And if you can really plead it, then you can plead it and we'll deal with that complaint

'cause most of the complaints I've seen have been amended to comply with the pleading requirements that have been enunciated in the various cases. This one wasn't for some reason. And I understand that the defendant didn't answer until November 2014, I think. And they said they didn't want to waste my time. But, you know, at the same token, I understand you don't want to waste the time. But just judging from what's pleaded here, I think it would make sense to seek leave to re-plead. But you don't have to. I will decide this.

MR. NEW: Your Honor, I think we will be seeking leave to re-plead.

THE COURT: Can we leave it at that? You'll make a motion, you'll attach an amended complaint, and you can argue that you're prejudiced or it's futile or there's been an undue delay although for the reasons I've discussed, you've already told me you wanted to wait. So, you know, I suppose they're entitled to wait.

MR. NEW: We can make that argument in the briefing but, yes, that's fine.

THE COURT: 'Cause you haven't convinced me about prejudice. You may have to put in --

MR. NEW: Fair enough.

THE COURT: -- some affidavit explaining somebody's died or some evidence has been destroyed and you

can't defend the action for that reason.

MR. NEW: Okay.

THE COURT: And if I deny the motion for leave to re-plead then maybe I'll decide this motion. All right. Does that make sense?

MR. ARKIN: Makes sense.

THE COURT: Okay. So I will hold this one in abeyance and I look forward to your motion.

MR. ARKIN: Only one thing --

MR. NEW: Thank you, Your Honor.

MR. ARKIN: -- Your Honor.

THE COURT: Yes, sir?

MR. ARKIN: Somebody used the word "imagine".

THE COURT: Pardon?

MR. ARKIN: Somebody used the word "imagine" just a few moments ago. I think Mr. New. No imaginary allegations.

THE COURT: Well, we can't sensor what they plead beforehand. Only after, I guess. So we'll see what they say.

MR. NEW: Your Honor, we --

MR. ARKIN: It's a prayerful admonition.

MR. NEW: Your Honor, we are mindful --

THE COURT: I join in that. These complaints are very long.

MR. NEW: Your Honor, we're mindful of Rule 11 and, obviously, we're not going to make any imaginary allegations.

THE COURT: No. No. I -- okay. Thank you very much.

MR. NEW: Your Honor, there is also a discovery issue --

THE COURT: Yes.

MR. NEW: -- in this.

THE COURT: Let me just mark -- make a note of that that's --

MR. ARKIN: Good morning, Your Honor.

THE COURT: Thank you very much.

MR. ARKIN: Thank you very much.

THE COURT: You're excused. You're welcome to stay but you're excused.

MR. NEW: Your Honor, the discovery dispute includes that as well.

THE COURT: Oh, okay. Yeah. Why don't we take yours -- well, it's really tied up -- and I understand that they didn't understand or maybe they should move for a protective order. I didn't see the -- did you file an objection?

MR. REISEN: We didn't -- oh, sure. We objected. And then we want to move for a stay if we needed to. But I

think the hope is that we will just wait and see whether they --

THE COURT: Doesn't the objection -- don't you have to do something if they object to the document request like make a motion compel discovery?

MR. NEW: Well, Your Honor, that's what we actually noted -- notified the Court --

THE COURT: Yeah.

MR. NEW: -- that it was a pre-motion conference and a motion to compel.

THE COURT: Doesn't it make sense to see if the complaint survives in this case?

MR. NEW: Your Honor, the complaint is going to survive, as you said, at least with respect to one count. They --

THE COURT: So you want to take discovery on that one count?

MR. NEW: Well, Your Honor, I think --

THE COURT: It's almost a strict liability count.

MR. NEW: Well, Your Honor, they're refusing to provide any discovery at all.

THE COURT: Right. Well, you --

MR. NEW: They refuse to answer any of the interrogatories. And with regard to the documents that they've previously produced, they won't stipulate to the

fact that they can be used in this case. So we don't have any documents other than eight pages of documents that they've produced. And no interrogatory responses at all.

THE COURT: But at the --

MR. REISEN: Your Honor --

THE COURT: -- end of the day, the only case may be the case that's alleged in Count I.

MR. REISEN: We've given all discovery on Count I. In fact, we produced it all. That shows all of the two-year transfers. We'll wait completely. And we're willing to do that. We can --

THE COURT: My suggestion is that rather than get involved in discovery before we know whether we have a sufficient -- legally sufficient complaint that we determine that first.

MR. NEW: Your Honor --

THE COURT: And you're right. You can take discovery on the first claim and then if, as you -- when you seek more discovery, they're going to say, hey, wait a minute. You know, this is becoming -- they're onerous -- you're seeking discovery in stages.

MR. NEW: Your Honor, I would simply ask that they actually comply with the local rule and respond to the interrogatory requests that were sent to them. They gave no responses to any of the interrogatory requests.

THE COURT: Oh, you didn't object?

MR. REISEN: Oh, we did. Sure. We objected --

THE COURT: In the interrogatory responses?

MR. REISEN: Yes.

MR. NEW: It was a general objection, Your Honor.

MR. REISEN: We're happy to give all objections if they want. We just think that that would be extra work.

THE COURT: Well --

MR. REISEN: And we may actually move for a stay. But we're perfectly willing to give discovery on (indiscernible). We already have.

THE COURT: My concern is if you're taking discovery before you have a legally sufficient claim and might argue we use that discovery to bolster the allegations which is exactly what you're not supposed to do.

MR. NEW: Except, Your Honor, the only thing I would point out is if this case does not arrive -- what's present before Your Honor is not a motion to dismiss. What's present before Your Honor is a motion for judgment on the pleadings. There is a case management order in place in which they agreed to proceed on discovery. We would have had -- if they had not been obstructionists, we would have actually had the benefit of that discovery to use going forward.

This -- and even in a motion to dismiss, Your

Honor, the state of the law is generally a stay is not appropriate. And there needs to be good cause for a stay. In this case, we don't think that they've established good cause. And they haven't even moved for a stay, Your Honor. And they have entered into a case management order in which they agreed to proceed with discovery.

MR. REISEN: If I could, Your Honor, as I understand that we're contemplating dismissing everything but Count I in the -- and we're having --

THE COURT: Well --

MR. REISEN: -- to give discovery on the one count that's legally sufficient. And then if they get to plead, of course give discovery on that as well.

THE COURT: Well, but he's saying, look, you know, it's a case management order. The motion itself doesn't stay discovery. And you were required to give discovery a long time ago and you never did it.

MR. REISEN: Well, for what it's worth, actually, we've given them essentially everything five years ago. But -- in the 2004. But for what it's worth, it's my understanding that, yes, we will give full discovery on everything that's still a valid pleading on file which will be just that one --

THE COURT: But there is a valid pleading on file.

MR. REISEN: That's right. Count I.

THE COURT: Well, no. There's a valid pleading. And all I suggested was, if you want, I'll decide this pleading and then I'll grant the leave to re-plead. If I dismiss it, all I'm suggesting is to cut through that because I do have questions about the sufficiency of the pleading and have them make a motion to re-plead and then you can make your futility and delay and prejudice arguments.

MR. REISEN: Yeah. So -- but at that point, the only -- you will have dismissed --

THE COURT: I'm not dismissing their complaint.

MR. REISEN: Fair enough. Well, I guess the idea would be that you would dismiss all but Count I and then you would see whether they have a right to re-plead and at that point, we'll give full discovery on the one count that's remaining. And then if you give them lead to re-plead, we'll, of course, give discovery on that as well.

THE COURT: Look, I'm going to hold the discovery in abeyance. Let's just see if you have a valid complaint or if it's just a claim for fictitious profits which is a much different claim from the type of claim you're trying to plead.

MR. NEW: Yes, it is, Your Honor. Thank you, Your Honor.

MR. REISEN: Thank you, Your Honor.